

PRAYER AND THE MEANING OF THE ESTABLISHMENT CLAUSE: A DEBATE ON TOWN OF GREECE V. GALLOWAY

*Patrick M. Garry**

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I. INTRODUCTION

This article arises from a debate hosted at The University of Akron School of Law and reflects the arguments made by the author at that debate, which focused on the case of *Greece v. Galloway*.¹

At issue in *Greece* was the constitutionality of the town of Greece's practice of opening its monthly town board meetings with an invocation given by a volunteer chaplain of the month.² The United States Court of

* Patrick Garry is a law professor at the University of South Dakota. He received a J.D. and a Ph.D. in Constitutional History from the University of Minnesota.

1. *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). After the debate, the author prepared these written remarks. After submitting these remarks, the United States Supreme Court decided the case, and the author submits this analysis without modification following the Supreme Court's opinion.

2. Members of many different religious traditions delivered invocations; the town allowed any interested person to offer an invocation and never declined a request to deliver an invocation before a Board Meeting. Pet. App 20a, 125a. Although the great majority of the invocations were

Appeals for the Second Circuit, using the endorsement test, ruled that this practice violated the Establishment Clause of the First Amendment to the United States Constitution.³

II. THE SHORT ANSWER: MARSH SUPPORTS THE PRAYER PRACTICE

In *Marsh v. Chambers*, the Supreme Court approved the practice of opening legislative sessions with a prayer delivered by a state-employed chaplain.⁴ The Court specifically ruled that the use of a prayer to open a legislative session did not constitute an establishment of religion but was “simply a tolerable acknowledgement of beliefs widely held among the people of this country.”⁵ The Court articulated two exceptions: (1) if the government acts with an impermissible motive in selecting the prayer-givers; or (2) if the government uses the prayer practice to proselytize on behalf of a particular religion.⁶

Even though the Second Circuit did not find that either of the two *Marsh* exceptions existed in *Galloway*, the court struck down the prayer.⁷ Instead of the *Marsh* “historical traditions” test, which was previously used in *Van Orden v. Perry* to uphold a Ten Commandments display, the Second Circuit applied the “endorsement test” to strike down the prayer practice.⁸

The *Marsh* test is the most relevant test in evaluating the constitutionality of legislative prayer and, thus, should dictate that the prayer practice in *Greece* is not judicially prohibited.

given by Christian representatives, recent invocation-givers included a Buddhist, a person whose religion was listed as Cherokee Indian, and a Wiccan High Priest. C.A. App. A1053-55. Furthermore, the town did not monitor the content of the invocations given. Pet. App. 8a. See Brief for Petitioner at 6-7, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (No. 12-696), 2013 WL 3935899, at *7.

3. *Galloway v. Town of Greece*, 681 F.3d 20, 29-31 (2d Cir. 2012).

4. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). The Court found there was nothing unconstitutional about having the prayer given by the same state-paid, Christian-denomination chaplain who had given the opening prayer for sixteen years. *Id.* at 793-94.

5. *Id.* at 792. According to *Marsh*, “historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress.” *Id.* at 790. Additionally, because legislative prayer was a common practice preceding and during the constitutional period, the historical approach of *Marsh* was consistent with constitutional reality, finding that legislative prayer was not an establishment of religion. *Id.* at 786-92.

6. *Id.* at 793-95.

7. On appeal, respondents dropped their argument that the town had intentionally discriminated against non-Christians, and the Second Circuit found there was “no religious animus” in the town’s invocation practice. Pet. App. 22a. See Brief for Petitioner at 10, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (No. 12-696), 2013 WL 3935899, at *8.

8. *Galloway*, 681 F.3d at 30; *Van Orden v. Perry*, 545 U.S. 677, syllabus (2005).

III. THE LONG ANSWER: THE MEANING OF THE ESTABLISHMENT CLAUSE

A. *The Confusing State of Jurisprudence*

Perhaps the unprecedented decision by the Second Circuit, as well as the striking down of a long-established practice, occurred in large part because of the confusing nature of the Supreme Court's Establishment Clause jurisprudence. This confusing and convoluted jurisprudence has been widely noted by scholars and court observers.⁹ A prime example of such confusion and inconsistency occurred in 2005 when the Supreme Court decided two similar cases, both involving public displays of the Ten Commandments, with exactly opposite results and essentially using three different constitutional tests.¹⁰

There is great doctrinal disarray in the Supreme Court's use of its Establishment Clause tests.¹¹ The oldest test, the *Lemon* test, has been abandoned by the Court.¹² The *Marsh* historical traditions test was virtually ignored by the Second Circuit; instead, it used the endorsement test, which was initially intended to be more accommodating to the historical role and presence of religion in society.¹³ On the other hand, the coercion test, previously used nearly exclusively with public prayers, was not used or referenced by the Second Circuit.¹⁴

The number of different tests, along with the confusing ways in which those tests are applied, means that courts can pick and choose among tests so as to reach and justify almost any decision. However, despite the plethora of tests, the Supreme Court has never defined the most crucial term of the Establishment Clause – the term “establishment.” Instead, it has used tests to determine whether the

9. See Patrick M. Garry, *Distorting the Establishment Clause into an Individual Dissenter's Right*, 7 CHARLESTON L. REV. 661, 661-62 (2013).

10. Compare *McCreary County v. ACLU*, 545 U.S. 844, paragraph one of the syllabus (2005) (striking down a frame display of the Ten Commandments using the secular purpose test), with *Van Orden*, 545 U.S. at 685-92 (upholding the display under the *Marsh* test); see also *id.* at 701-06 (Breyer, J., concurring) (using his own legal judgment test as swing vote to uphold display).

11. See Patrick M. Garry, *Religious Freedom Deserves More Than Neutrality*, 57 FLA. L. REV. 1, 3-6 (2005).

12. See *id.* at 6 (describing the Court utilizing different tests before settling on the neutrality approach).

13. The test, first used in *Lynch v. Donnelly*, upheld a public display of a Christmas crèche. 465 U.S. 668 (1984). Then, in *Salazar v. Buono*, the test was used to strike down a memorial to World War I veterans built decades earlier by private groups and funds, but using a Roman cross. 559 U.S. 700 (2010).

14. For cases applying the coercion test to public prayers, see, e.g., *Santa Fe Indep. Sch. District v. Doe*, 530 U.S. 290, 316 (2000); *Lee v. Weisman*, 505 U.S. 577, 586 (1992).

“symptoms” of establishment are occurring. But this practice has produced, in Justice Kennedy’s words, a “jurisprudence of minutia,” extending the reach of that clause to the most discreet, insular, and momentary interactions between government and religion.¹⁵

B. The Purpose of the Establishment Clause

The issue in *Greece* is not the appropriateness, sensitivity, or wisdom of the prayers. It is not whether religiously-motivated people can act with unkindness and inconsideration, or whether religiously-motivated people always live up to their beliefs. It is not about whether some people are offended by the prayers. The Establishment Clause is not about feelings, just as the Speech Clause is not about the feelings of people who disagree with or are offended by other people’s speech. The issue in *Greece* is whether the government of that town acted or exercised a power forbidden by the First Amendment.¹⁶

The Establishment Clause forbids laws “respecting” an establishment of religion.¹⁷ It does not forbid laws accommodating, facilitating, or supporting religion or religious freedom.¹⁸ The endorsement test, as it has evolved, tends to equate establishment with people’s feelings of offense or marginalization when confronting public displays or expressions of religion.¹⁹ A more historically accurate definition, however, has been provided by Michael McConnell.²⁰ He reminds us that, during the constitutional period, establishments of religion were characterized by factors such as government financial support of a religion, government control of church doctrine or personnel, and government assignment of important civil functions to a religion.²¹ This definition of establishment, contrary to the endorsement test, focuses on the actions of the state and the institutional connections or interferences between government and particular religious groups.

The scope and nature of the Establishment Clause should also be viewed in connection with the scope and nature of the Free Exercise

15. *County of Allegheny v. ACLU*, 492 U.S. 573, 674 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part).

16. *Greece*, 134 S. Ct. at 1818.

17. U.S. Const. amend. I.

18. The First Amendment must allow the government to “respect the religious nature of our people and accommodate the public service to their spiritual needs.” *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

19. See Garry, *supra* note 10, at 678-81 (discussing the endorsement test as a form of dissenter’s right because of a fear of marginalizing dissenters).

20. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131-76 (2003).

21. *Id.*

Clause. For instance, the Establishment Clause is often seen as the only protector against public-religious interactions that may be overreaching, coercive, or intimidating to objectors.²² However, the Free Exercise Clause, as the dominant liberty clause, protects against government actions that coerce, infringe on, or intimidate an individual's exercise or non-exercise of religious beliefs.²³

The Establishment Clause also works in tandem with the Free Exercise Clause.²⁴ Both clauses are complimentary to each other, insofar as both serve the cause of religious liberty.²⁵ Whereas the Free Exercise Clause is the primary religious liberty clause, serving as the individual or minority rights clause, the Establishment Clause is more narrowly focused on the group or institutional aspect of religion.²⁶ The Establishment Clause is not an individual rights clause; it is a clause focused on the institutional liberty and autonomy of religious organizations.²⁷ A government establishment of religion (such as occurred with the Church of England) violates the liberty and autonomy of the religion that is taken over by the government, as well as the liberty of all other religious institutions consequently discriminated against or handicapped by having another religion receive preferential government treatment.²⁸

As a religious liberty clause, the Establishment Clause is not a secularism clause; its primary effect is not to ensure a secular society, free from the public presence of religion.²⁹ Nothing in the constitutional debates or history suggests that the First Amendment framers wanted to achieve and then ensure a secular society. Indeed, the overwhelming evidence points to just the opposite desire.³⁰ The First Amendment, by recognizing religion as the first liberty, recognizes the specialness of religion to the framers and drafters. This is not to say that the Establishment Clause does not, to some degree, carry indirect benefits for secularism. However, secularism is not the Clause's primary purpose.

22. See Patrick M. Garry, *The Institutional Side of Religious Liberty: A New Model of the Establishment Clause*, 2004 UTAH L. REV. 1155, 1166 (2004).

23. *Id.*

24. For a discussion on the relationship between the Establishment and Free Exercise Clauses, the nature of each, and the ways in which they complement each other, see *id.* at 1158-1160, 1163-1170.

25. See Garry, *supra* note 10, at 662-68.

26. See *id.* at 662.

27. *Id.*

28. See *id.* at 666-68.

29. See *id.* at 684, 688-90.

30. See *id.* at 670-74.

One way in which the Establishment Clause is used as a secularism clause is its attempted application as a “heckler’s veto.” Primarily through the endorsement test, as used by the Second Circuit, the Establishment Clause has been interpreted as a “reverse” Free Exercise Clause, aimed at protecting an individual dissenter’s right to be free from exposure to the public presence of religion.³¹ Under this interpretation, the Free Exercise Clause protects the freedom to practice religion, whereas the Establishment Clause protects a freedom from the public practice of religion. But again, nothing in the constitutional history suggests that the Establishment Clause was meant to be a “reverse” Free Exercise Clause, nor that it was intended to be what the Speech Clause was not – i.e., a heckler’s veto.³² Indeed, *Marsh* contradicted a heckler’s veto view of the Establishment Clause by focusing on government intent rather than on the prayer’s effect on listeners.³³

C. *Historical Proof of an Accommodating Establishment Clause*

As recognized in *Marsh*, there was much interplay between religion and the public square at the time the Bill of Rights was passed.³⁴ Religion played a prominent role not only in society but in the framers’ conception of democracy and civic life.³⁵ According to the *Marsh* Court, the Establishment Clause was not intended to eliminate religion’s role or interplay with society.³⁶ To the contrary, the Clause was meant to accommodate the types of relationships between religion and the public square that existed at the time of the First Amendment’s framing and ratifying.³⁷

31. *Id.* at 685.

32. The Establishment Clause does not protect against feelings of offense. “People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation.” *Lee*, 505 U.S. at 597. *See also* *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (refusing to apply the Establishment Clause “using a modified heckler’s veto” on behalf of perceptions of certain people who disagree with the perceived message).

33. *Marsh*, 463 U.S. at 794-95. Moreover, in *Van Orden*, Justice Thomas found the impressions of dissenters to the display irrelevant to any Establishment Clause ruling. 545 U.S. at 696-98 (Thomas, J., concurring).

34. *Marsh*, 463 U.S. at 787-88.

35. *See generally* PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002); JOHN WITTE JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES* (2000). *See also* Patrick M. Garry, *The Democratic Aspect of the Establishment Clause*, 59 *MERCER L. REV.* 595, 611-17 (2008); Garry, *supra* note 12, at 15-24.

36. *Marsh*, 463 U.S. at 790-91.

37. The Establishment Clause permits the accommodation of religion, for instance, in solemnizing certain public events with invocations. As the Court has stated, government

Legislative prayer was one such interplay that, as ruled by *Marsh*, was meant to be accommodated by the Establishment Clause.³⁸ Indeed, public prayer was very common and accepted during the constitutional period. For instance, this country's first four presidents (the ones most connected to the constitutional period) – Washington, Adams, Jefferson and Madison – all declared numerous days of national prayer and oversaw religious services held in federal government buildings.³⁹ The day the First Amendment was adopted, Congress responded with a prayer of thanksgiving.⁴⁰ When the Northwest Ordinance was reenacted, the First Congress declared that religion was necessary for good government.⁴¹

D. *Full Circle Back to Marsh*

The discussion of history brings the argument back, full circle, to the precedent and rationale of *Marsh*.⁴² The Court then, as it should now, used history as an important guide in determining the meaning and purpose of the Establishment Clause. History provides a more objective and consistent meaning than that provided by the more subjective endorsement test.⁴³

Problems with the endorsement test are evident in the Second Circuit's decision in *Galloway*.⁴⁴ The Second Circuit recognized that prayer could not be banned, that prayer of some sort was allowed, and that the judiciary should not become enmeshed in determining the proper content of prayer.⁴⁵ Furthermore, the Second Circuit recognized that *Marsh* prohibited government parsing of prayer – e.g., to determine if a prayer is too religious.⁴⁶ Nonetheless, the Second Circuit violated all

“accommodation, acknowledgement, and support for religion are an accepted part of our political and cultural heritage.” *Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in judgment in part and dissenting in part). See also Garry, *supra* note 12, at 39-41.

38. For a discussion of the Establishment Clause and accommodation, see Garry, *supra* note 25, at 1171-73.

39. See Garry, *supra* note 10, at 670-74.

40. *Id.* at 672 & n. 46.

41. *Id.* at 672 & n. 44.

42. *Marsh*, 463 U.S. 783.

43. The endorsement test—relying on the Court's conclusion as to what a reasonable observer might perceive about a government interaction with religion and placing the determination of ‘establishment’ in the perception of the individual perceiver—is “formless, unanchored, subjective.” *Doe v. Elmbrook Sch. District*, 687 F.3d 840, 872 (7th Cir. 2012) (Posner, J., dissenting).

44. *Galloway*, 681 F.3d 20.

45. *Id.* at 33-34.

46. *Id.* at 31.

these principles by delving into the content of the delivered prayers so as to determine whether they might have made certain objectors feel like outsiders.⁴⁷ But this approach, relying on each court's individual assessment of the psychological effects of individual prayers can ultimately produce only one workable result – the banning of all prayer in such venues.⁴⁸ On the other hand, if a court's approach results in the banning of all prayer, this in turn could cause violations of the Free Speech and Free Exercise Clauses, promote government hostility toward religion, and effectively cement the Establishment Clause as a heckler's veto.⁴⁹

IV. CONCLUSION

In an increasingly secular society, secularism is important. But secularism is the result of political and social forces. It is not the mandate of the First Amendment. The Establishment Clause obviously gives room for secularism to flourish, if society so wishes. But the purpose of the Clause is not to further secularism.

The Establishment Clause was not meant to protect society from religion, but to protect religious institutions from government interference or discrimination. History provides the most objective and accurate guide to applying the Establishment Clause. When courts can follow history, they ought to do so. Granted, history may not provide a clear answer in some circumstances; but when it does provide such an answer, as with the practice of legislative prayer, it should be followed. *Marsh* follows history, and the Supreme Court should follow *Marsh* in its decision in *Greece*. If it fails to follow history, long-entrenched practices such as presidential inauguration prayers, invocations before congressional sessions, the national motto, and the opening of Supreme Court sessions (“God save this Honorable Court”) will be thrown into

47. *Marsh* stated that the “content of the prayer is of no concern to judges” unless evidence shows that “the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.” 463 U.S. at 794-95. A judicial parsing of prayer language “not only embroils judges in precisely those intrareligious controversies that the Constitution requires [the judiciary] to avoid, but also imposes on [it] a task that [it is] incompetent to perform.” *Rubin v. City of Lancaster*, 710 F.3d 1087, 1100 (9th Cir. 2013). The endorsement test’s approach of determining when prayers are too religious or when they are sufficiently absent of religious content places the Court into the role of “a national theology board.” *Allegheny*, 492 U.S. at 678 (Kennedy, J.).

48. The endorsement test is “no test at all, but merely a label for the judge’s largely subjective impressions.” Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795, 815 (1993).

49. The law must avoid “an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents.” *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in judgment in part and dissenting in part).

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THE PRAYER IN GREECE

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doubt and conflict.